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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. ~~72~~ - 261

JAMES O. MILLER,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No.

JAMES O. MILLER

Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To *The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States*:

The Petitioner, James O. Miller, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above-entitled case on July 17, 1972.

A. The Opinion Below

There was no opinion by the Second Circuit Court of Appeals who affirmed the case after hearing oral argument on July 17, 1972. The defendant was convicted after trial for violating Sections 173 and 174, Title 21, United States Code, and was sentenced to a term of fifteen years in prison

on March 3, 1972. The defendant has been released on bail in the sum of fifty thousand dollars since his sentence of March 3, 1972. A request was submitted to the Circuit Court of Appeals on July 24, 1972, for a stay of the mandate and for bail pending certiorari to the Supreme Court of the United States. There has been no decision on this application as of this date.

B. Jurisdiction

The judgment of the Court of Appeals was entered on July 17, 1972, and the jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that the review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Questions Presented

1. Can an alleged buyer of small amounts of cocaine be charged with knowledge of illegal importation?

2. Can a person be a member of a conspiracy if the proof fails to show that he knows any of the conspirators?

3. Can a New York State wiretap be used in Federal Court without the proper federal safeguards?

4. Can a defendant be compelled to go on trial without the attorney of his choosing at a complicated multiple conspiracy case on twenty-four hours notice?

5. Must a defendant have notice that his telephone was tapped within the statutory period of time?

D. United States Constitution and the Statutes

United States Constitution, Fourth Amendment.

United States Code, Title 21, Sections 173, 174.

United States Code, Title 18, Sections 2510-2518.

E. Summary Statement of Matters Involved

The above defendant-appellant, along with several other defendants, was arrested in August, 1971, and charged with violating the federal narcotic laws. The arrest of petitioner James O. Miller was predicated upon a wiretap order which was signed on September 3, 1970, by Justice Jawn A. Sandifer, Supreme Court, New York County. After this wiretap, detectives obtained a wiretap for co-defendant Enrique Hernandez and co-defendant Madeline Pineda. There were no federal safeguards attached to the issuance of this wiretap order or for the return of this wiretap order as they were solely within the jurisdiction of New York State.

A seizure of narcotics was made from co-defendants Madeline Pineda, Martin Hernandez and Victor Hernandez and co-conspirator Mario Sepulveda on November 6, 1970. Pineda and the two Hernandez boys went to trial in Westchester County and were convicted while Mario Sepulveda acted as an informer for the government, testifying both in the state prosecution and in the federal prosecution. Of all the defendants tried, petitioner James O. Miller is the only person who was not identified by any co-conspirator who testified. The complete government case was based upon the fact that Miller had telephone conversations with Enrique

Hernandez which were interpreted by police officers as having a narcotic connotation.

The actual wiretap conversations admitted into evidence indicated that if anything, Miller was a buyer of narcotics from Hernandez and there was no proof as to the amounts of narcotics purchased and Miller was not charged with being in actual possession of any narcotics. It should be conceded by the government that the narcotic in question here was cocaine. The trial court failed to charge that petitioner Miller *must* have had actual or constructive possession of the cocaine or he *must* have had actual knowledge of the illegal importation of the cocaine under the doctrine set forth in this Court in *Turner* v. *U. S.*, 390 U.S. 398. There was a hearing after trial to determine whether or not Miller received the statutory notice showing that his phone was tapped. The Court held that even though he received this notice *after* the statutory period of time as prescribed by Congress, it was not instrumental in setting aside his conviction. This rule has not been decided by any circuit court of appeals. However, Judge Weinstein's opinion in this case is contrary to Judge Muir's opinion in *U. S.* v. *Eastman*, 326 F. Supp. 1038.

F. Reasons for Granting Writ

POINT I

This Court should grant a writ of certiorari to clarify the decision in *Turner* v. *U. S.*, 390 U.S. 398. The facts in this case are contrary to the Court's reasoning that cocaine could be purchased domestically. The Second Circuit Court of Appeals in *Gonzalez* v. *U. S.*, 442 F 2d 698, reasoned that a substantial amount of cocaine found to be in possession

of a person destroys the inference that the source of a large amount of cocaine could be a domestic source. In this particular case, the prosecution was unable to show that Miller had either actual knowledge that the cocaine hydrochloride was illegally imported nor was the prosecution able to show that Miller was in possession of any *large* quantity of cocaine.

POINT II

This Court should grant a writ of certiorari to review the "independent proof" test of who becomes a member of a conspiracy. The government's main witnesses, co-conspirators Sepulveda and Valverde testified against all other members of the conspiracy as to certain meetings, conversations and deliveries of narcotics. At no time did either Valverde or Sepulveda ever meet petitioner Miller nor hear his name mentioned by any other co-conspirator. This Court should grant the writ to amplify decisions of the Circuit Court set forth in *U.S.* v. *Consolidated Laundries*, 291 F. 2d 563 and *U.S.* v. *Stromberg*, 268 F. 2d 256.

POINT III

This Court should grant a writ of certiorari to determine whether the New York Code of Criminal Procedure, Sections 813 to 822, properly conform to the federal wiretap statutes, Title 18, Sections 2510, et seq. The wiretap utilized in this particular case was placed on the telephone of James Miller on September 3, 1970, pursuant to an order of New York State Supreme Court Justice Jawn A. Sandifer and signed by Frank Hogan, the duly elected District Attorney of New York County. The New York Code of

Criminal Procedure provides for a return and inventory of all telephonic intercepted conversations within a statutory period. This specified time period is synonymous with the federal law. This Court should determine whether a New York State wiretap can properly be admitted into federal court unless it meets all of the federal safeguards and allows the federal judiciary a complete and independent inquiry; for this Court has always stated that an independent inquiry in the admissibility and legality of evidence is necessary, *Elkins* v. *U.S.*, 364 U.S. 206.

It is further noted that the federal wiretap laws demand that the Attorney General or his duly designated representative must sign the affidavit which is submitted ex-parte to a federal judge. The federal statutes do not state that a district attorney, even though duly elected in a state jurisdiction, is competent to sign a wiretap affidavit in a federal proceeding.

POINT IV

This Court should grant a writ of certiorari to determine whether or not it is reasonable to compel a defendant to proceed to trial or face the alternative choice of immediate incarceration unless he permits a new attorney to defend him on twenty-four hours notice. It is alleged that even the finest attorney cannot properly defend any person in a complicated multi-conspiracy trial on twenty-four hours notice. The judge's coercion as indicated in the annexed exhibit(B) indicates that the defendant's federal safeguards under the Sixth Amendment were completely emasculated.

POINT V

This Court should grant a writ of certiorari to determine whether the constitutional safeguards concerning the return on a wiretap within the statutory period of time necessarily vitiates the use of any wiretap evidence. The Fourth Amendment of the United States Constitution and Title 18, United States Code, Section 2518(8d) require a defendant who is subjected to a wiretap be furnished with inventory and notice under specific time limitations. The failure of New York State to properly comply with the federal statute should require the conviction of James O. Miller be set aside under the doctrine of *Alderman* v. *U.S.*, 394 U.S. 165, and the dictum opinion of the Supreme Court in *U.S.* v. *Disist*, 394 U.S. 244 and to clarify Judge Muir's decision in *U.S.* v. *Eastman*, 326 F. Supp. 1038, where he stated "The failure to serve the requisite inventory and notice vitiates the wiretap and precludes the use of evidence derived therefrom."

CONCLUSION

In conclusion, the writ of certiorari should be granted and the Court, in the exercise of its power, should order the judgment of conviction reversed.

Respectfully submitted,

JOSEPH I. STONE
Attorney for Petitioner
Member of the Bar of the
Supreme Court of the
United States
Office & P.O. Address
277 Broadway
New York, New York 10007

EXHIBIT A

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of July one thousand nine hundred and seventy-two.

Present:

HON. WILFRED FEINBERG,
HON. WILLIAM H. MULLIGAN,
HON. JAMES L. OAKES,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NICODEMUS OLATE-ROMERO, JUSTO QUINTANILLA, a/k/a ARNALDO, LUIS CAROL OTEY-AMPUERO, EDUARDO BORRONE-IGLAR, AMADA RAMIREZ, MADELAINE PINEDA, AGAPITO-GU-LEON, VICTOR HERNANDEZ, MARTIN HERNANDEZ, ENRIQUE HERNANDEZ, JOSEPH GERNIE, JAMES MILLER, a/k/a PLUG-GIE, MANUEL FIGUEROA-MILLA, a/k/a PAJARITO, MANUEL BRITO SALINAS a/k/a JOHN DOE,
Defendants,

EDUARDO BORRONE-IGLAR, MADELAINE, PINEADA, VICTOR HERNANDEZ, MARTIN HERNANDEZ, ENRIQUE HERNANDEZ, JOSEPH GERNIE, MANUEL FIGUEROA-MILLA, AGAPITO GU-LEON, JAMES MILLER,
Defendants-Appellants.

Exhibit A

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was urged by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they are hereby affirmed as to all appellants except appellants Joseph Gernie and Eduardo Borrone-Iglar and as to appellant Joseph Gernie decision be and it hereby is reserved.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

EXHIBIT B

Telegraphic Message

NOVEMBER 29, 1971

TO:
EDWARD LEOPOLD, ESQ.
COHEN, LEOPOLD & POVERSTEIN
44 COURT STREET
BROOKLYN, NEW YORK 11201

RE: USA v. OLATE-ROMERO, et al, 71-CR-874

YOUR LETTER OF NOVEMBER 26, 1971 SEEKING AN ADJOURNMENT IN THE CASE SET FOR TRIAL ON DECEMBER 2, 1971 IS DENIED. FAILURE TO INFORM THE COURT UNTIL THIS DATE OF THE FACT THAT YOU HAD BEGUN A CASE ON NOVEMBER 8TH KNOWING THAT IT WOULD PROBABLY INTERFERE WITH YOUR COMMITMENT TO THIS COURT IS NOT UNDERSTOOD BY THIS COURT. IN VIEW OF MULTIPLE DEFENDANTS AND COUNSEL, ALL COUNSEL WERE ADVISED THAT THE DATE SET WAS FIRM AND THAT IF ANY COUNSEL COULD NOT APPEAR HE WAS TO INFORM HIS CLIENT IMMEDIATELY SO THAT HIS CLIENT COULD OBTAIN OTHER COUNSEL.

YOU AND YOUR CLIENT WILL APPEAR IN THIS COURT TOMORROW, NOVEMBER 30, 1971 AT 9:00 A.M. TO EXPLAIN YOUR FAILURE TO COMPLY WITH THIS COURT'S ORDER. FAILURE OF YOUR CLIENT TO HAVE COUNSEL AVAILABLE FOR THE TRIAL WILL RESULT IN HIS BEING INCARCER-

Exhibit B

ATED. THE COURT RESERVES THE RIGHT TO TAKE SUCH OTHER ACTION AS IS APPROPRIATE AGAINST YOU AND YOUR CLIENT INDIVIDUALLY. SO ORDERED.

JACK B. WEINSTEIN
JUDGE, UNITED STATES DISTRICT COURT

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-261

JAMES O. MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals issued no opinion.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1972. The petition for a writ of certiorari was filed on August 17, 1972, and is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence that petitioner knew the cocaine in this case was illegally imported.

2. Whether there was sufficient evidence to sustain petitioner's conviction as a conspirator.

3. Whether evidence obtained pursuant to a wiretap order authorized by a state judge was admissible in a federal prosecution.

4. Whether the requirement that petitioner be notified that he was the subject of a wiretap order was properly complied with.

5. Whether the trial court erred in denying petitioner's motion for a continuance.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner and eight others were convicted of having conspired to violate 21 U.S.C. (1964 ed.) 174. Petitioner was sentenced to imprisonment for a term of fifteen years and fined $10,000. The court of appeals affirmed without opinion (Pet. App. Exhibit A).

The evidence at trial showed a large-scale conspiracy to import and distribute cocaine. The scheme involved transporting 21 kilograms of cocaine to New York aboard a Chilean ship (Tr. 374-379, 454).[1] Upon arrival in New York on or about September

[1] "Tr." and "S. Tr." refer, respectively, to the transcript of the trial and post-trial hearing on petitioner's motion to suppress.

6-7, 1970, the cocaine was thrown off the ship by one of the conspirators and retrieved by a skindiver (Tr. 411-414, 426-442). The cocaine was then brought ashore and sold to the Hernandez brothers (Enrique, Martin, and Victor), who in turn sold the cocaine to others, including petitioner (Tr. 455-465). A subsequent shipment of 40 kilograms arrived in New York on November 5-6, 1970.

The government's evidence linking petitioner to the illicit scheme consisted almost exclusively of conversations intercepted through a wiretap on his telephone, which had been authorized by a New York State court.

On September 9, 1970, petitioner was observed leaving his apartment and driving to a location in Manhattan, where he passed a shopping bag to Enrique Hernandez (Tr. 967-969). Later that day the court-authorized wiretap was placed into operation and a call between Enrique and petitioner was intercepted. The conversation concerned a dispute about money petitioner owed Enrique (Tr. 1014-1015; Conv. 1). During a second conversation, intercepted on September 14, Enrique indicated that there were "one or two left" and petitioner asked Enrique "to hold one for [him]."[2] Enrique agreed but insisted

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[2] Detective Tuckett testified that this expression referred to one or two kilograms of narcotics (Tr. 1055-1056).

Copies of the intercepted conversations of petitioner are being lodged with the Clerk of this Court. At trial the tapes were played and the jury was provided with transcripts of the tapes (Tr. 1049-1051A). "Conv." refers to the conversation intercepted.

that petitioner see him that day (Conv. 2). Later that day petitioner telephoned one Nelson in Boston, who ordered "½ of one" (Conv. 3).

On September 16 petitioner received a telephone call from a person who identified himself as "Joe" and asked if petitioner remembered "the matter we spoke of," and if petitioner could "take care of it" (Conv. 4). After indicating to Joe that he would call and find out, petitioner dialed Enrique's number and spoke to Enrique's wife, who did not know where her husband was or whether there was "anything there" (Conv. 4-7). Petitioner then called Enrique's brother, Victor, but was again unsuccessful in locating Enrique (Conv. 8). Petitioner called Joe back and offered to give Joe "some of what I got" if petitioner was unable to reach Enrique (Conv. 9).

ARGUMENT

1. Petitioner contends that the government failed to prove he knew the cocaine was illegally imported since there was no proof that he had possessed any of the cocaine. Although there was no direct evidence regarding petitioner's knowledge of illegal importation, there was more than enough circumstantial evidence to permit the jury to infer that petitioner knew the cocaine had been illegally imported into this country.

The contents of the intercepted conversation of September 9 concerning a dispute over money indicated that petitioner, who had been observed that day giving Enrique a bag, had paid Enrique $3,000. Since

the cost of a kilogram of the imported cocaine was $11,000 (Tr. 465), the jury could properly infer that petitioner had purchased at least half a pound of cocaine. Further evidence of petitioner's dealing in large quantities of the imported cocaine is found in his conversation with Enrique on September 14 when a purchase of one kilo was arranged, half of which was then sold by petitioner to a customer in Boston. Finally, in a conversation of October 13, 1970, intercepted pursuant to a court-authorized wiretap on Enrique's telephone, petitioner called Enrique and asked him to "save me a couple," an apparent reference to two kilograms of cocaine (Conv. 10). Given the large amount of cocaine petitioner purchased and agreed to purchase, the jury could properly infer that petitioner knew the drugs that if illegally imported had been. See *United States* v. *Gonzalez*, 442 F. 2d 698, 707, 710 (C.A. 2) (en banc), certiorari denied *sub nom. Ovalle* v. *United States*, 404 U.S. 845; cf. *Turner* v. *United States*, 396 U.S. 398, 416-417.[3]

2. Relying on the fact that neither of the two co-conspirators who testified for the government (Sepulveda and Valverde) identified him as a conspirator, petitioner contends that there was insufficient evidence to sustain his conviction. It is not neces-

[3] The trial judge did not instruct as to the presumption of knowledge of illegal importation flowing from possession of narcotics under 21 U.S.C. (1964 ed.) 174, but rather instructed the jury, without objection, that the government had to "prove that the drugs were imported to the knowledge of each defendant * * *" (Tr. 1573). In so doing the trial court permitted the jury to draw the natural inferences from the evidence.

sary, however, that a conspirator know every other member of the conspiracy or all of the details of the conspiracy. *Blumenthal* v. *United States*, 332 U.S. 539, 556-557; see also *United States* v. *Nasse*, 432 F. 2d 1293, 1297-1298 (C.A. 7), certiorari denied, 401 U.S. 938. The evidence here showed that after being brought ashore the cocaine was sold to the Hernandez brothers on September 7, with final payment made to Sepulveda, the supplier, by September 14 (Tr. 454-465, 854-855). The wiretap interceptions showed that it was during this time period that petitioner negotiated and made purchases of cocaine from Enrique, one of the conspirators. That the cocaine in question was part of the September 6-7 shipment is supported by the fact that petitioner purchased some cocaine shortly after it arrived in New York aboard the Chilean ship. Furthermore, during the conversation of September 14, in which Enrique agreed to sell petitioner a kilo of cocaine, Enrique demanded to see petitioner that day, apparently in an effort to sell the cocaine quickly so that Sepulveda could be paid that day. Petitioner's request for more cocaine in his conversation with Enrique on October 13, 1970, also showed that petitioner was a continuing link in the conspiracy to import and distribute cocaine.

3. The wiretap warrant in this case was sought and issued under the provisions of the New York Code of Criminal Procedure §§ 813-J-825 (now McKinney's Consolidated Laws of New York Annotated, Criminal Procedure Law, Art. 700 (1971 ed.)). Pe-

titioner contends that a writ of certiorari should issue to determine whether the state statute conforms to the requirements of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 212, as amended, 18 U.S.C. 2510 *et seq.* But the state statute follows the federal statute almost verbatim and the application and order in this case satisfied the requirements of both statutes. See *United States* v. *Poeta*, 455 F. 2d 117, 119 n. 5 (C.A. 2), certiorari denied, No. 71-1146, May 22, 1972.

Section 2516(2) of 18 U.S.C. requires that state court warrants comply with 18 U.S.C. 2518 before evidence obtained by state officials can be used by federal officials to prosecute for a federal offense. See 18 U.S.C. 2517. The trial judge found here that there was sufficient "hard evidence in the affidavit to have permitted the Judge in the State Court to grant the [wiretap] order" (Tr. 75). This finding is not challenged here.

Additionally, we note that since the investigation in this case was commenced by state officials it was proper, contrary to petitioner's claim, for the District Attorney of the County of New York to sign the wiretap application. See 18 U.S.C. 2516(2); N.Y. Code of Crim. Proc. § 814(5) (N.Y. Crim. Proc. Law § 700.05(5) (1971)).

4. Petitioner also contends that he did not receive timely notice that his telephone had been tapped. After an extensive post-trial evidentiary hearing, Judge Weinstein found that prior to the expiration of an order extending the time in which to give

petitioner notice, an assistant district attorney personally informed petitioner's counsel, Mr. Leopold, that petitioner's phone had been tapped. The trial judge also found that two of the detectives on the case had made three timely attempts to serve petitioner and that a copy of the notice was mailed to petitioner (S. Tr. 122-124). Judge Weinstein concluded that petitioner was not prejudiced and that the "mailing and the prior attempts to serve [him] constituted full compliance with the statute" (S. Tr. 124). This ruling was correct. *United States* v. *Lawson*, 334 F. Supp. 612, 616-617 (E.D. Pa.); see also *United States* v. *Wolk*, C.A. 8, No. 71-1678, decided August 30, 1972.[4]

5. At a pre-trial hearing on October 7, 1971, Judge Weinstein fixed the date of trial for December 2, 1971, and told all defense counsel to advise their clients immediately of any scheduling conflicts so that substitute counsel could be obtained. On November 26, 1971, petitioner's counsel, Mr. Leopold, wrote the trial judge and requested a continuance of the trial in this case on the ground that he was engaged in a state trial that had commenced on November 8 and was expected to continue through December. Judge Weinstein denied the request, noting that all counsel had previously been advised that the trial date of December 2, 1971, was firm (Pet. App.

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[4] The situation here is thus quite different from that in *United States* v. *Eastman*, 326 F. Supp. 1038, 1039 (M.D. Pa.), relied upon by petitioner, where the issuing judge "intentionally eliminated the service of the inventory and notice."

Exhibit B). Petitioner contends that the trial court's denial of the motion for continuance abridged his Sixth Amendment rights by compelling the choice of incarceration or proceeding to trial with a new counsel on twenty-four hours' notice.

However, in view of the facts that counsel had been admonished to report scheduling problems promptly, that this case involved multiple defendants, and that a definite trial date had been set almost two months previously, Judge Weinstein did not abuse his discretion in denying the request for a continuance. See *Ungar* v. *Sarafite*, 376 U.S. 575, 589; *Avery* v. *Alabama*, 308 U.S. 444, 446. Furthermore, petitioner has made no showing of prejudice as a result of the trial judge's ruling here. Following the denial of the continuance, Mr. Leopold secured his partner, Mr. Poverstein, to represent petitioner at trial. Mr. Poverstein never claimed that he had insufficient time to prepare for trial, petitioner does not contend that he was denied effective assistance of counsel, and the record does not reveal ineffective representation. Although this case involved a lengthy trial, the evidence regarding petitioner's participation in the conspiracy was limited, and petitioner's trial counsel had the benefit of the pretrial discovery obtained by his partner.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

ROGER A. PAULEY,
RICHARD A. LEVIE,
Attorneys.

SEPTEMBER 1972.

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